No. 86-1673 (3)

IN THE

Supreme Court of The United States

CHRISTOPHER GREGORY,

Petitioner,

v.

THOMAS J. DRURY, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CHRISTOPHER GREGORY'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 15, 1987

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In accordance with 28 U.S.C. § 1738, the Federal courts must give preclusive effect to a prior state court judgment where the new claim asserted under 42 U.S.C. § 1983 in a subsequent action between the same parties and requesting the same relief is entirely grounded upon and based upon the identical facts and issues which have already been asserted and fully adjudicated in prior state court actions and appeals from such state court actions to the United States Supreme Court.[1] (In reply to Petitioner's Questions 1 and 2)

2. There is no conflict in the decisions of the Fifth Circuit Court of Appeals and those decisions of the Seventh and Tenth Circuit Court of Appeals in their claim preclusion application under 28 U.S.C. § 1738 and 42 U.S.C. § 1983 to prior state court judgments. (In reply to Petitioner's Question 3)

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[1] The factual basis and the issues raised by Petitioner, Gregory, in his action under 42 U.S.C. § 1983 have heretofore been presented to this court in No. 80-1677 in the United States Supreme Court, October term, 1980, styled Christopher Gregory v. Mark White, Attorney General of the State of Texas, et al. See Respondents' Joint Appendices, Appendix N, page 114a.

PARTIES IN THE COURT OF APPEALS

The parties in the Fifth Circuit Court of Appeals were the Petitioner, Christopher Gregory, and the Respondents, Thomas J. Drury, Bruno R. Goldapp, Elena S. Kenedy, Lee H. Lytton, Jr., Kenneth Oden, Mark White as Attorney General of the State of Texas, and The Alice National Bank.

Pursuant to Petitioner's Motion for Leave to File a Second Amended Complaint, which was never acted on by the United States District Court for the Southern District of Texas, Petitioner sought to update his Amended Complaint by naming as defendants the then current member of the John G. and Marie Stella Kenedy Memorial Foundation, Rene H. Gracida, Lee H. Lytton, Jr., E. B. Groner, Daniel Meaney and Sister Bernard Marie Borgmeyer, by substituting the then current Attorney General of the State of Texas, Jim Mattox, and retaining The Alice National Bank, Kenneth Oden and Thomas J. Drury as defendants.

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Thomas J. Drury, Lee H. Lytton, Jr., Elena S. Kenedy, Bruno R. Goldapp, Kenneth Oden and The Alice National Bank, Respondents, file this, their Joint Brief in Opposition to Christopher Gregory's Petition for Writ of Certiorari in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered on January 27, 1987 is not yet officially reported and is reprinted in Appendix A.[2]

[2] Respondents' Joint Appendices to Respondents' Joint Brief in Opposition will be cited as, for example, "Resp.s' App. A-1a". The letter designates the particular Appendix and the number refers to the particular page of the Appendices.

The unreported judgment of the United States District Court for the Southern District of Texas, entered on January 24, 1986, was without opinion and is reprinted in Appendix B.

This Court's denial of a petition for writ of certiorari from a judgment of the Supreme Court of Texas in the prior state court action is reported at 452 U.S. 939 (1981), as shown in Appendix O. The judgment of the Court of Civil Appeals of Texas in the prior state court action is reported at 604 S.W.2d 402 (Tex. Civ. App.-San Antonio 1980, writ ref. n.r.e.), and is reprinted in Appendix K. The final judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on November 28, 1979 was unreported and is reprinted in Appendix I. The interlocutory judgment entered in the prior state court action by the 79th Judicial District Court of Jim Wells County, Texas, on September 1, 1964 was unreported and is reprinted in Appendix C.

COUNTER-STATEMENT OF THE CASE

PRELIMINARY STATEMENT[3]

Petitioner in this Federal action in truth and in fact is not invoking 42 U.S.C. § 1983 for its intended purpose of protecting people from unconstitutional action under color of state law, but to relitigate the very same matters he raised or could have raised in the state court. Having litigated these same matters in the state trial court, the intermediate Court of Civil Appeals and the Texas Supreme Court and then finally the U.S. Supreme Court by Petition for Writ of Certiorari (represented by the same attorneys he has in this Federal action), Gregory now again seeks to relitigate the same issues and matters. In effect, he is seeking a direct appeal to a United States District Court to review a final judgment of the Courts of Texas.

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[3] Petitioner Gregory in his Appellent's Brief filed in the 5th Circuit Court of Appeals in Footnote 3 on page 4 stated: "The Appellees moved under Fed. R. Civ. P. 12(b) to dismiss the Complaint on the grounds that: (1) it failed to state a claim for relief; (2) the action was barred by the statute of limitations; and (3) the action was precluded by res judicata and collateral estoppel. (R.E. 7-10). With respect to the second and third grounds, matters outside the pleadings were presented to and not excluded by the District Court. Under Fed. R. Civ. P. 12(c), the Appellees' motions should have been treated as motions for summary judgment under Fed. R. Civ. P. 56. *See Public Citizen* v. *Lockheed Aircraft Corporation,* 565 F.2d 708, 711 n.5 (D.C. Cir. 1977). Accordingly, in his Statement of Facts, Gregory will refer to matters of record outside the pleadings."

The Court of Appeals in Footnote 1 of its opinion also noted that "All parties here and below have referred to matters extrinsic to the complaint. They were also considered by the District Court in its grant of a motion to dismiss." The Court of Appeals also noted; "We could, with equal confidence, treat the ruling below as a grant of summary judgment."

In view of the above prior position of Gregory and the findings and ruling of the Fifth Circuit, he is now in no position to limit any consideration to a dismissal under Fed. R. Civ. P. 12(b), especially when he seeks to bolster his position by references to newspaper articles. These matters are not a part of the record of this case, and should not be considered for any purpose by this Court. Accordingly, Respondents do not make reference to extraneous articles which are supportative of Respondents' position.

The United States Supreme Court in *District of Columbia Court of Appeals* v. *Feldman,* 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983), stated: "As we have noted, supra, at 476, 75 L.Ed. 2d, at 218, a United States District Court has no authority to review final judgments of the state court in judicial proceedings. Review of such judgment may be had only in this Court." (p.222)

The Supreme Court in *Feldman* in Footnote 16 of its opinion explained:

> As we noted in *Atlantic Coast Line Railroad Company* v. *Brotherhood of Engineers*, 398 U.S. 281, 26 L.Ed.2d 234, 90 S. Ct. 1739 (1970), "lower federal courts possess no power whatever to sit in direct review of state court decisions." Id., at 296, 26 L.Ed.2d 234, 90 S. Ct. 1739.
>
> Moreover, the fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims.

HISTORY OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On September 21, 1981, the Petitioner, Christopher Gregory ("Gregory"), filed this action in the United States District Court for the Western District of Texas. Gregory named as Defendants the then members of the Kenedy Memorial Foundation, Elena S. Kenedy, Bruno O. Goldapp, Kenneth Oden, Lee H. Lytton, Jr., and Bishop Thomas J. Drury, and also named as Defendants were the then Attorney General of the State of Texas and the Alice National Bank. In his Complaint, Gregory alleged that the Respondents and others successfully combined and conspired to deprive him of his rights to trial and trial by jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution, U.S. Const. Amend. V and XIV, and 42 U.S.C. § 1983.

On October 14, 1981, the Texas Attorney General filed his Original Answer and Motion for Judgment on the Pleadings, in which he sought dismissal of the Complaint on the grounds of res judicata and failure to state a claim for relief. Respondent, Lee H. Lytton, Jr., ("Lytton") filed a similar Answer and Motion on October 23, 1981. On October 26 and 29, 1981, the Respondents, Thomas J. Drury (then the Bishop of the Diocese of Corpus Christi), Elena S. Kenedy, Bruno R. Goldapp, Kenneth Oden and the Alice National Bank filed original Answers, including the defense of improper venue, Motions for Judgment on the Pleadings, limitations and laches. Pursuant to the U.S. District Court's Order, on March 31, 1982, Gregory filed an Amended Complaint.

On April 9, 1982, the District Court for the Western District of Texas transferred the case to the Southern District of Texas, on the grounds of forum nonconvenience and the National Bank Act. On May 18, 1982, Gregory moved to disqualify Judge Hayden Head, Jr., the District Court's Judge originally assigned to the case after transfer to the Southern District of Texas. Judge Head disqualified himself by Order entered October 8, 1982. This action was then assigned to Judge Bue on or about October 3, 1983.

On June 19, 1985, Judge Bue scheduled all then pending motions in this cause for hearing on October 31, 1985. The hearing on all pending motions subsequently was rescheduled for January 9, 1986. On January 9, 1986, after a lengthy hearing in chambers, Judge Bue granted the Respondents' Motions for Judgment on the Pleadings (with costs) and denied as moot the remaining Motions. An Order was entered on January 24, 1986, granting the Respondent's Motion for Judgment on the Pleadings and dismissing Gregory's action with prejudice and denying all other relief not expressly granted or which was inconsistent with the dismissal.

On January 27, 1987, the Fifth Circuit Court of Appeals affirmed the judgment of the U.S. District Court by written opinion reprinted in Appendix A.

STATEMENT OF THE FACTS[4]

During her lifetime, Mrs. Sarita K. East, a Texas resident, caused to be incorporated under the Texas Non-Profit Corporation Act, The John G. and Marie Stella Kenedy Memorial Foundation, for religious, charitable and educational purposes. Initially, Mrs. East was the sole member, but in February 1960, she appointed Jacob S. Floyd and Lee H. Lytton, Jr., both residents of the State of Texas, as co-members of such Foundation. Sometime thereafter she requested and received their resignations as members. In December 1960, Mrs. East appointed Gregory, a Trappist monk based in Spencer, Massachusetts, as a co-member. The Will of Sarita K. East, dated January 22, 1960, left the residue of her estate to her Foundation. A First Codicil to said Will, named the Bishop of the Diocese of the Roman Catholic Church of Corpus Christi, Texas, as her successor to membership in such Foundation upon her death. Thereafter, from time to time, Mrs. East made additional codicils to such Will, and under the Third Codicil, she revoked the First Codicil which named the Corpus Christi Bishop, and appointed Gregory,

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[4] All parties to this action, the U.S. District Court, and the Fifth Circuit Court of Appeals have treated the skeleton facts outlining the history of the state court decisions in such cases as a statement of undisputed facts in this case. Respondents, in their statement of facts, refer to facts outlined in such previous state court cases and to those in the record of this case. Numerous facts alleged to be true in Petitioner's Petition for Writ of Certiorari have no basis in any of the previous state court decisions or in this record. For example, on page 5 above of Petitioner's Petition to this court, Respondents cite these statements as having no basis in any prior state decision or in this record, to-wit:

a. "The Foundation was established on January 22, 1960, by a wealthy and deeply religious South Texas widow, Sarita Kenedy East, for the purpose of assisting the poor and underprivileged primarily in South America."

b. "However, Mrs. East discovered shortly thereafter that Floyd's advice was erroneous."

c. "It was because of one such South American trip with Gregory that Sarita East decided to form the Foundation and dedicate its resources to the poor in South America."

The remainder of the Petition is replete with erroneous assertions not found in this record or in any of the previously reported state decisions.

Peter Grace and Father Patrick J. Peyton as successor-members to her after her death. (*Gregory* v. *Lytton,* 422 S.W.2d 586, Tex. Civ. App., San Antonio, 1967, writ ref. n.r.e., at page 587; Resp.s' App. Q-204a)

In February 1961, Mrs. East died in New York City and thereafter, in April 1961, Lytton (later joined by Floyd) filed a suit against Peter Grace, Father Peyton, Thomas Doyle and J. J. Meehan, all residents of the State of New York, the Foundation and Gregory, said suit being filed in the District Court of Jim Wells County, Texas, as Cause No. 12,074, styled Lee H. Lytton, Jr., et al. v. The John G. and Marie Stella Kenedy Memorial Foundation et al. The Attorney General of Texas was later joined in the suit as an indispensable party. Lytton and Floyd alleged generally that their respective resignations as members of the Foundation were obtained as a result of undue influence exerted upon Mrs. East by Gregory, et al. and that the revocation of the First Codicil appointing the Corpus Christi Bishop and the December 1960 appointment of Gregory as a member of the Foundation were also procured as a result of undue influence practiced upon Mrs. East by Gregory et al. *Gregory* v. *Lytton,* supra, at page 587; (Resp.s' Q-204a) The Houston, Texas, law firm of Baker & Botts (Messrs. Robert K. Jewett and Denman Moody) were retained to represent Gregory, Peter Grace, Father Peyton, Tom Doyle, Jack Meehan and the Kenedy Memorial Foundation. (*Gregory* v. *White,* 604 S.W. 2d 402, Tex. Civ. App., San Antonio, 1980, writ ref. n.r.e., at page 404; petition for cert. denied, 452 U.S. 939 (1981) Resp.s' App. K-86a)

Thereafter, a contest of the Will and Codicils of Mrs. East was filed by her heirs-at-law on July 25, 1962. (*Trevino* v. *Turcotte,* 564 S.W.2d 682, Tex. S. Ct., 1978, at page 684; Resp.s' App. T-291a) While the Will contest was pending, under date of October 28, 1963, a settlement agreement was fully executed in this case and on September 1, 1964, an agreed interlocutory judgment was entered by the Court upon such settlement agree-

ment with prejudice as to all parties. (*Gregory* v. *White,* supra, at page 404; Resp.s' App. K-86a).

In connection with such settlement, a full and final agreement between the parties was reached in August of 1963, and each of the clients represented by Baker & Botts (including Gregory) consented in writing by affixing their signatures to the settlement agreement and agreed Judgment. Gregory signed both documents as "Christopher Gregory," and under the name appeared "Christopher Gregory, Sometimes Known as Brother Leo, OCSO, Defandant and Cross-Defendant, Acting Individually and as a Religious of the Cistercian Order of the Strict Observance Under Valid Authority of His Lawful Religious Superior." The documents signed by Gregory, Grace, Doyle, Meehan and Father Peyton were transmitted to Baker & Botts and received by them on October 9, 1963; whereupon, Baker & Botts presented the agreement to Mr. Kenneth Oden as the representative of Lytton and Floyd on October 10, 1963, and Mr. Oden undertook to present it to his clients for their signatures. The settlement agreement and Judgment were then signed by the Texas Group and the last person to sign was Mr. Zuber, Assistant Attorney General of Texas, and he signed on October 28, 1963. (*Gregory* v. *White,* supra, at page 404; Resp.s' App. K-86a)

Thereafter, on September 1, 1964, the settlement agreement was presented to the trial court for approval and entry of Judgment thereon. Mr. Jewett was acting as a member of his firm Baker & Botts, in the entry of the Judgment which was provided for in the settlement agreement. Mr. Jewett acted upon the terms and provisions of the signed settlement agreement and agreed Judgment which were delivered to him for implementation, and with that authority from Gregory, his attorney, Mr. Jewett, satisfied the requirements of the settlement agreement with respect to the membership of the Foundation and all other provisions of the settlement agreement. Certain corporate proceedings were to take place in open court incident to the implementation of the Judgment, and Mr. Jewett acted in carrying out in open court

those corporate proceedings. Mr. Jewett obtained a proxy from Grace and he received an authorization from Gregory's Abbot, Thomas Keating, to act for Gregory in carrying out the corporate proceedings. Mr. Jewett had been advised that further authority to act for Gregory in implementing the settlement and Judgment would be sent to him, and Mr. Jewett did thereafter receive a letter dated July 9, 1964, signed by Gregory and addressed to his Abbot.[5] This letter from Gregory to his Abbot granted to the Abbot full power and authority to act for Gregory in the premises and, in connection with the implementation of the settlement agreement and agreed Judgment. (*Gregory* v. *White,* supra, at page 404; *Gregory* v. *Lytton,* supra, at page 588; Resp.s' App. K-86-a; Resp.s' App. Q-204a)

Some one and one-half years after the entry of the Judgment, Gregory gave to the trial court his first notice of his claim of non-consent by the filing of his Application for Bill of Review on March 8, 1966, seeking to set aside the agreed Judgment. The Bill of Review was dismissed and the Court of Civil Appeals affirmed. (*Gregory* v. *Lytton,* supra, at page 586, 587; Resp.s' App. Q-204a)

Thereafter, Gregory filed his Motion in Cause No. 12,074 in the District Court of Jim Wells County, Texas, on August 1, 1968, to set aside such agreed Judgment. In Gregory's Motion to set aside the agreed Judgment (and in his Amended Motion to set aside Judgment), Gregory asserted:

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[5] The July 9, 1964, letter from Petitioner to Abbot Keating read in pertinent part as follows:

"Reverend Father: Aware that what I am today signing may be at any time used by the person to whom it is addressed in any manner that he in conscience may see fit, I wish to make the following carefully worded but unequivocal statement . . . .

"In the present situation I accept the decision of events in the light of the above, without condition and thus I shall initiate no further action whatsoever concerning the Kenedy Memorial Foundation. The word 'initiate' does not preclude my cooperating in such actions as my superiors may judge to be necessary for the finalizing of the settlement already agreed upon."

1. That his consent to the settlement and agreed Judgment was obtained by duress;

2. That his consent was conditionally given, and these conditions were never met;

3. That the delivery of the signed settlement agreement and the entry of the agreed Judgment was made by a person or persons unauthorized to make such delivery under the circumstances;

4. That the settlement became impossible of performance by reason of the death of Jacob Floyd;

5. That the settlement agreement had been altered and provisions changed and added without his consent, and without the consent of any person authorized by him;

6. That the settlement agreement was incomplete and incapable of settling all the issues;

7. That the Defendant was not present at the entry of the Judgment, and that he had not authorized the person or persons purporting to act for him at the time of entry of the Judgment;

8. That in any event, he no longer consented to the settlement agreement or the agreed Judgment; and

9. That all pleadings by all other parties were denied.

(Resp.s' App. E-42a; Resp.s' App. F-46a)

After Gregory's filing of his Motion to set aside the agreed Judgment, he took no action on this motion for eleven years.

In 1978, the Will contest was terminated (Resp.s' App. T-291a) and except for the pendency of Gregory's Motion to set aside the agreed Judgment, the time had come for the trial court to make such Judgment a final one. Therefore, on July 24, 1979, the Attorney General of Texas et al. filed a motion for the Entry of Final Judgment and to Dismiss Petitioner's Motion to Set Aside the Interlocutory Judgment. (*Gregory* v. *White*, supra, at page 403; Resp.s' App. K-86a) On or about September 13, 1979, Gregory filed his first Amended Motion to set aside the agreed

interlocutory Judgment, and a copy of said pleading was served upon all parties in interest in the litigation, including the Alice National Bank, Mrs. Kenedy, Goldapp and Oden. (Resp.s' App. F-46a) All of the members and directors of the Kenedy Memorial Foundation (Mrs. Kenedy, Bishop Drury, Lytton, Goldapp and Oden) were served either individually or through their attorney with a copy of said pleading by registered mail. Thereafter, Kenneth Oden intervened in the action and filed an answer to the Motion and Amended Motion of Gregory to set aside the interlocutory agreed Judgment in behalf of the Kenedy Memorial Foundation, Mrs. Kenedy, Bishop Drury, Lytton, Goldapp, the Alice National Bank, as Independent Executor of the East Estate, and Oden, individually. The answer denied all allegations made by Gregory in his Motions to set aside the agreed interlocutory Judgment. (Resp.s' App. G-52a) An answer to the Motion of the Attorney General for entry of Final Judgment and dismissal of the Gregory Motion was also filed by Oden in behalf of the same named parties above described. (Resp.s' App. H-55a) Gregory made no effort to attempt to strike any of the parties. In addition, the above-named parties have participated in the proceedings of Cause No. 12,074 through Final Judgment and on each appeal of such Judgment through the Supreme Court of the United States. (*Gregory* v. *White,* supra, at page 403; Resp.s' App. K-86a)

A trial upon the issues raised by Gregory's Motion and the Motion for the Attorney General was held on September 21, 1979. The record in the state proceedings discloses that Gregory's jury demand at this proceeding was not timely made, and that Gregory failed to complain of the lack of a jury at the time of the trial on September 21, 1979. Nor did he move for continuance orally or in writing on the ground that he was not prepared to go to trial. The matters in issue were then tried to the Court, without a jury, and upon hearing, the court entered Final Judgment and dismissed Gregory's Motion. (*Gregory* v. *White.,* supra, at page 403; Resp.s' App. K-86a) Gregory appeared in person and with his counsel at the September 21, 1979, trial and he testified in

support of his legal positions in issue therein. Gregory specifically asserted in his Petition for Writ of Certiorari in *Gregory* v. *White* (Resp.s' App. N-114a) that he raised the issues of right to trial and right to trial by jury in the trial court. (Resp.s' App. N-127a)

At the trial court level, Gregory essentially took the position that even though he had signed the settlement agreement and agreed interlocutory Judgment, yet he did not consent at the time of the hearing, September 21, 1979, to the entry of Final Judgment, and, therefore, such Judgment could not be made final. The Attorney General and Kenedy Memorial Foundation et al. offered evidence showing the unconditional nature of the consent and agreement of Gregory, as well as the authority of those acting in behalf of Gregory on September 1, 1964, at the time such settlement and agreed interlocutory Judgment were entered of record. (*Gregory* v. *White,* supra, at page 403-404; Resp.s' App. K-86a)

Final Judgment was entered by the Texas court on November 28, 1979, and Gregory filed an appeal to the Court of Civil Appeals (Fourth Supreme Judicial District — San Antonio), wherein he raised four points of error. In such brief Gregory asserted (1) that the trial court erred in entering Final Judgment without a trial on the merits; (2) that the trial court erred in rendering the settlement agreement and interlocutory Judgment final without a trial on the merits of the issues raised by Gregory in his Motion; (3) that the trial court erred in dismissing his Motion without a jury trial; and (4) that the trial court denied Gregory due process of law in entering Judgment without a trial on the issues raised by Gregory in his Motion. (Resp.s' App. J-68a)

The Texas Court of Civil Appeals held that the evidence conclusively established that Gregory signed the settlement agreement and that the Judge had no reason to know of any dissatisfaction which Gregory might have had with the agreement at the time the interlocutory Judgment was rendered and that since the trial court had no knowledge of any lack of consent prior

to entry of the interlocutory order, Gregory could not prevent Final Judgment by attempting to later withdraw his consent. In connection with Gregory's claim of conditional delivery of the settlement agreement and agreed Judgment, the Court of Civil Appeals noted that "neither the Appellant's (Gregory's) attorneys, the attorneys for the Appellees, the trial Judge, nor any of the other parties to the suit knew of the conditional nature of his consent until several months after the Judgment was rendered." (*Gregory* v. *White,* supra, at page 404; Resp.s' App. K-86c)

Gregory then filed an Application for Writ of Error to the Supreme Court of Texas, wherein he again asserted his denial of a trial on the merits point, his denial of a jury trial point, and his denial of due process point. These points of alleged error are more particularly described in Gregory's Application for Writ of Error. (Resp.s' App. L-93a) The Supreme Court of Texas refused the writ, citing no reversible error. (Resp.s' App. M-113a)

Gregory then filed his Petition for Writ of Certiorari to the United States Supreme Court, represented therein by the same counsel, (James D. St.Clair, Hale and Dorr) in this present action and appeal, wherein he again asserted a denial of due process in that he alleged he was denied both a trial on the merits on the issues raised by his Motion and he was denied a jury trial. Gregory also raised other points more particularly described in his Petition for Writ of Certiorari. (Resp.s' App. N-114a) On June 15, 1981, the United States Supreme Court denied Gregory's Petition for Writ of Certiorari and let stand the judgments and actions of the Courts of Texas. (Resp.s' App. D-191a)

Thereafter, Gregory filed the Complaint in this cause on September 17, 1981, asserting essentially the same facts as were asserted in the Texas case, except that the actions of the party Defendants were now cast in the form of a conspiracy involving the Attorney General of the State of Texas, and alleged violations of 42 U.S.C. § 1983 were brought forward in this federal action. (Resp.s' App. P-192a)

REASONS FOR DENIAL OF THE WRIT

1.

IN ACCORDANCE WITH 28 U.S.C. § 1738, THE FEDERAL COURTS MUST GIVE PRECLUSIVE EFFECT TO A PRIOR STATE COURT JUDGMENT WHERE THE NEW CLAIM ASSERTED UNDER 42 U.S.C. § 1983 IN A SUBSEQUENT ACTION BETWEEN THE SAME PARTIES AND REQUESTING THE SAME RELIEF IS ENTIRELY GROUNDED UPON AND BASED UPON THE IDENTICAL FACTS AND ISSUES WHICH HAVE ALREADY BEEN ASSERTED AND FULLY ADJUDICATED IN PRIOR STATE COURT ACTIONS AND APPEALS FROM SUCH STATE COURT ACTIONS TO THE UNITED STATES SUPREME COURT.

The Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, requires and it is now settled law that a Federal court must give to a State court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. *Allen* v. *McCurry,* 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982). *Allen* v. *McCurry* made clear that issues actually litigated in a State court proceeding are entitled to the same preclusive effect in a subsequent Federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered. In *Migra* v. *Warren City School Board of Education,* 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the Supreme Court extended and applied the same preclusive effect of a State court judgment in a subsequent Federal § 1983 suit that the § 1983 litigant could have raised but did not raise in the earlier State court proceeding.

The Full Faith and Credit Clause "Allows the States to determine .... the preclusive effect of judgments in their own courts" *Marrese* v. *American Academy of Orthopedic Surgeons,*

470 U.S. 373, 380; 105 S.Ct. 1327, 1332; 84 L.Ed.2d 274, 281 (1985); *Parsons Steel* v. *First Alabama Bank,* 106 S.Ct. 768; 88 L.Ed.2d 877 (1986).

Under the Texas Doctrine of res judicata and collateral estoppel, Gregory must concede without reservation all of the factual issues and claims placed in dispute in Cause No. 12,074 in the District Court of Jim Wells County, Texas, and all appeals therefrom; since the same facts and issues asserted in the previous Texas case formed the basis for Gregory's § 1983 action, no new facts or independent claim has been asserted which has not already been the subject of state judicial review and disposition.

The principal of res judicata will bar relitigation in a subsequent action of an issue which was or should have been in the earlier action if (1) the prior judgment has been rendered by a court of competent jurisdiction, (2) the decision was a final judgment, (3) the same parties are involved in both actions, and (4) the same cause of action is involved in both suits. *Wasoff* v. *American Automobile Insurance Company,* 451 F.2d 767 (5th Cir., 1971) Under res judicata, the judgment in the first case bars the subsequent action "not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." *Stevenson* v. *International Paper Company,* 516 F.2d 103, 109 (5th Cir., 1975)

Under the Texas law of res judicata,

> ". . . . . an existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. Further, the rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which with the use of diligence might have been tried in a former action as well as those which were actually tried." *Abbott Laboratories* v. *Gravis,* 470 S.W.2d 639, 642 (Tex. S. Ct., 1971)

For the principle of res judicata to be applicable as a preclusion to subsequent claims or issues, definite elements must be shown to exist, namely identity of parties, issues, subject matter, relief sought and cause of action. *Franklin* v. *Rainey,* 556 S.W.2d 583, 585 (Tex. Civ. App., Dallas, 1977, no writ); *Bonniwell* v. *Beech Aircraft Corporation,* 663 S.W.2d 816, 818 (Tex. S. Ct., 1984); *Hudspeth* v. *Hudspeth,* 673 S.W.2d 248 (Tex. Civ. App., San Antonio, 1984, writ ref. n.r.e.)

Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana* v. *United States,* 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979); *Allen* v. *McCurry,* 101 Sup. Ct. 411, 414, (1980) There are three requirements for the application of collateral estoppel to a federal claim: (1) identify between the issue at stake and the issue litigated in the earlier proceeding, (2) actual litigation of the critical issue, (3) necessity that the decision on the issue in the prior litigation be a necessary, essential part of the judgment in the earlier action. *Holmes* v. *Jones,* 738 F.2d 711 (5th Cir., 1984); *Hicks* v. *Quaker Oats Company,* 662 F.2d 1158 (5th Cir., 1981)

In the case before this Court, Gregory has heretofore conceded that the prior final judgment in the Texas court was rendered by a court of competent jurisdiction, and that for res judicata purposes, the requirement that the prior judgment be a final judgment on the merits has been established.

As to the identity of parties, this record clearly shows that the Respondents were all a party to the litigation in the prior state action, and they were all parties to the September 1, 1964, interlocutory judgment and agreed settlement, and they all appeared in the trial of September 21, 1979. (Resp.s' App. G-52a; App. H-55a; App. I-58a) In addition, these Respondents participated in every appeal proceeding of the prior Texas judgment, and

they were specifically named by Gregory as a party Defendant to this litigation under 42 U.S.C. § 1983.

The Texas courts have expressly held that persons who have a direct interest in the litigation and exercise their right to participate therein, including the participation in appeals from such litigation, then such persons are real parties to the action, and they are bound by the judgment as though they were a named party. (*American Indemnity Company* v. *Fellbaum,* 263 S.W. 908, Tex. S. Ct., 1924); *Cavers* v. *Sioux Oil and Refining Co.,* 39 S.W.2d 862 (Comm. App., 1931)

Since the parties to this action are identical (save and except the New York Defendants in Cause No. 12,074, which Gregory has chosen not to join in this action), the requirement for identity of parties is clearly established.

The primary legal issue before this court concerns the question of whether the federal claims asserted in Gregory's § 1983 action is "a different cause of action" than those asserted in the prior Texas action, and if such claim is "a different cause of action," then whether such claim is precluded under either the doctrine of res judicata or collateral estoppel.

The Fifth Circuit has recently reviewed the Texas law governing res judicata and its application to federal claims or causes of action filed under 42 U.S.C. § 1983 in *Flores* v. *Edinburg Consolidated I.S.D.,* 741 F.2d 773 (5th Cir., 1984) A full analysis of style cases from the Texas Supreme Court was made in Justice Higginbotham's opinion, and particular attention was directed to the legal question concerning "a different cause of action" under Texas law in a § 1983 case. The court held,

> ". . . . . if res judicata barred the relitigation only of those issues actually decided in the first action, it would be indistinguishable from collateral estoppel with respect to the issues raised in the pleadings; only with respect to issues that should have been raised in the pleadings but were not raised would res judicata pose a greater bar than collateral estoppel. See *Gilbert* v. *Fireside Enterprises, Inc.,* 611 S.W.2d 869, 871

> and note 4 (Tex. Civ. App., 1980). Furthermore, if the pleading of a different legal theory would have induced the court to decide a particular issue in the first action, the issue is plainly one 'which, with the use of diligence might have been tried in the former action.' Diligence is, in brief, a key determinant of the applicability of the res judicata bar to any particular issue . . . . . ." page 776

> ". . . . . We conclude therefore that 'a different cause of action' is one that proceeds not only on a sufficiently different legal theory but also on a different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be managed even if all the disputed factual issues raised in the Plaintiff's original complaint are conceded in the Defendant's favor . . . . . ." page 777

Applying this test to Gregory's § 1983 claims, as in the *Flores* case, Gregory cannot concede the factual issues previously raised in the Texas courts and at the same time prevail in his § 1983 claim. His federal action claims are grounded upon material facts and issues that were litigated in the prior action.

Gregory asserts that his claims of lack of consent, duress, coercion and related claims were never litigated. It is obvious from the opinion of the Texas Court of Appeals in *Gregory* v. *White,* supra, that once the settlement agreement had been incorporated into the judgment of the court, Gregory had the opportunity and the duty, if he wished to set aside such interlocutory judgment, to come forward with affirmative proof or evidence of fraud or collusion in connection with the original entry of the September 1, 1964, interlocutory judgment. *Gregory* v. *White,* supra, at page 403. Incident to any such allegation and proof of fraud or collusion, Gregory had the opportunity to offer evidence of lack of consent by Jewett, duress, coercion or any other related claim to show impropriety with the entry of the September 1, 1964, judgment. This he failed to do; conversely, Respondents offered affirmative evidence of the unconditional and untarnished nature of such prior interlocutory judgment and the surrounding circumstances of its entry.

Gregory in such trial proceeding chose to rely solely on the erroneous legal proposition that he had now represented to the trial court prior to the rendition of a final judgment that he no longer consented to the terms of the interlocutory judgment, and that the court was under a duty to set such interlocutory judgment aside and to proceed to hear the matters in controversy created by the withdrawal of the interlocutory judgment.

The state is free to establish its own procedures and practices with regard to conduct of civil litigation in Texas courts, including the right to trial by jury. *Iacapondi* v. *New Amsterdam Cas. Co.*, 258 F. Supp. 880, D.C. Pa., 1966, aff'd 379 F.2d 311; cert. denied in 88 S. Ct. 802, 389 U.S. 1054, 19 L.Ed. 2d 849; *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, 427 S.W. 2d 344 (Tex. Civ. App., Dallas, 1968, no writ hist.)

Accordingly, the Texas courts have established their own procedures and practices in connection with the right to a jury trial in civil matters. Article I, Section 15 and Article V, Section 10 of the Texas Constitution, V.A.T.S., preserve and protect the right of any litigant in a civil case to be afforded a jury trial, provided however, that these Texas Constitutional provisions further empower the state legislature to enact such statutes as are necessary to regulate the right to trial by jury.

The Texas Rules of Civil Procedure have been promulgated as the rules governing the trial of civil cases in all Texas courts. Rule 216 et seq., of these Rules of Civil Procedure specifically prescribe the provisions related to the right to a jury trial.[6]

The right to trial by jury in Texas is not an absolute right in civil cases, but rather, it is subject to certain procedural rules,

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[6] Rule 216 provides that "No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance."

such as Rule 216 of the Texas Rules of Civil Procedure. *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, supra.

Even though the provisions of Rule 216 have been held to be discretionary rather than mandatory in their application, the Texas courts have consistently held that when Rule 216 has not been complied with, a trial court's decision to grant or deny a jury trial will not be reversed on appeal except on a showing of abuse of discretion by the trial court. In the previous appeals in the Texas courts and to this Supreme Court, it was Gregory's burden on appeal to show an abuse of such discretion. *Childs* v. *Reunion Bank,* 587 S.W.2d 466, (Tex. Civ. App., Dallas, 1979, writ ref. n.r.e.); *Arnoff* v. *Texas Turnpike Authority,* 299 S.W.2d 342 (Tex. Civ. App., Dallas, 1957, no writ hist.); *Wooten* v. *Dallas Hunting & Fishing Club, Inc.*, supra. The abuse of discretion, if any, must be shown and must be "apparent on the face of the record." *Ramsey* v. *Dunlop,* 205 S.W. 2d 979 (Tex. S. Ct., 1947); *Hernandez* v. *Light Pub. Co.,* 245 S.W.2d 553 (Tex. Civ. App., San Antonio, 1952, writ ref.) The record in this case and in the previous Texas appeals is completely void of any showing of an abuse of discretion by the trial court. Since there is nothing in the record to show any of the circumstances surrounding the jury request except that it was untimely made, no error and no abuse of discretion was shown by Gregory in the prior appeal or in this appeal. *Lebman* v. *Sullivan,* 198 S.W.2d 280 (Tex. Civ. App., San Antonio, 1946, writ ref. n.r.e.); *Arnoff* v. *Texas Turnpike Authority,* supra.

By failing to press his jury demand at trial, Gregory waived his untimely jury demand and consented to a non-jury trial of the issues before the court. *Hernandez* v. *Light Pub. Co.,* supra; *Richardson* v. *Raby,* 376 S.W.2d 422 (Tex. Civ. App., Tyler, 1964, no writ hist.); *Huddleston* v. *Western National Bank,* 577 S.W.2d 778 (Tex. Civ. App., Amarillo, 1979, writ ref. n.r.e.).

Due process involves the fundamental right to be heard and the full and fair opportunity to litigate issues and present evidence at a meaningful time and in a meaningful manner. *Fuentes* v.

Shevin, 407 U.S. 67 (1972) Gregory had a full and fair opportunity to litigate those issues and facts that could have given rise to the setting aside of the interlocutory judgment, and he failed to do so. There has been no denial of his right to litigate those issues pertaining to the propriety of the interlocutory judgment "in a meaningful manner," and he should not now be heard to complain from his lack of diligence or his erroneous concepts of Texas law.

Applying the *Flores* test regarding the concession and admission of all facts and issues in dispute in the prior state action, Gregory would have to concede that his execution of the settlement agreement which was incorporated into the interlocutory judgment was accomplished without coercion or duress, and that the judgment was entered with his full consent, authority and without fraud or collusion of any person. The conceding of these issues and factual basis completely defeats and renders Gregory's § 1983 claims to be without merit as a matter of law in that such federal claims are grounded on facts and issues heretofore litigated in favor of Respondents. A review of Gregory's factual assertions and the issues presented in his Amended Complaint in this § 1983 case as compared with the factual allegations and issues presented in the Texas Courts and previously to this court, clearly demonstrate that his § 1983 claim is predicated on the same factual background and issues which have previously been adjudicated by the Texas Courts.

The designation by Gregory of certain facts as a conspiracy, all of these facts being adjudicated in a previous state proceeding, and the allegation that he has been denied (1) membership in the Kenedy Memorial Foundation, (2) the right of trial and (3) the right to jury trial, all of the foregoing being as a result of such alleged conspiracy, do not alter or change the character of the facts, the issues or the alleged claims in the prior state proceedings or in this proceeding. *Holmes* v. *Jones,* supra.

Although Gregory continues to deny to this court that his right to a trial on the merits and right to trial by jury were issues before

the Texas courts, in his first Petition for Writ of Certiorari to this court, Gregory claimed in connection with the September 21, 1979, trial, that:

> "Counsel for Gregory appeared at the hearing and raised the issue of Keating's lack of authority under civil law to grant a power of attorney on behalf of Gregory. He also raised the issues of right of trial and right to trial by jury." (Resp.s' App. N-127a)

In each stage of the appeal prócess in Texas courts, and to this court, he raised the same denial of trial and denial of jury trial points that are raised in this § 1983 action. (Resp.s' App. J-68a; App. L-93a; App. N-114a)

The subject matter of the prior Texas case and this § 1983 federal action are the same — a determination or redetermination of who is entitled to serve as members and directors of the Kenedy Memorial Foundation. The relief sought in this proceeding is the same relief sought in the prior Texas case — to appoint Gregory as the sole member and/or director of the Kenedy Memorial Foundation with complete authority over such Foundation to the exclusion of all other interested parties. The same "rights" are asserted by Gregory herein as were asserted in the prior state action; the same "wrongs" are asserted by Gregory in this action as form the basis of the factual allegations in prior state action; and the same facts are required in each case for Gregory to have sustained and substantiated his claims and requested relief.

In light of the foregoing, these Respondents submit that the requisite elements for the application of res judicata and/or collateral estoppel to preclude the § 1983 federal claims of Gregory have been clearly identified and established as a matter of law, in that this federal litigation involves:

> a. The same parties, subject matter, issues and factual determinations, relief sought and causes of action;

b. The express federal claims of denial of a trial on the merits and denial of jury trial were raised at the trial court and every appeal thereafter, and thus, they have been the subject of full and fair state judicial review and disposition;

c. The operative facts on which Gregory relies in this § 1983 claims have been litigated in state court, and therefore, all such facts and issues must be conceded in favor of Respondents;

d. With the conceding of those facts and issues placed in dispute and litigated in the state court in favor of Respondents, Gregory has failed to state a claim upon which relief may be granted as a matter of law.

In connection with the res judicata — collateral estoppel application of final state court judgment to subsequent federal § 1983 claims, it is now well established that the doctrines of res judicata and collateral estoppel may be utilized to preclude both issues and/or claims that have been asserted and litigated in prior state actions, irrespective of whether the precise federal claim was asserted in the prior state action. *Allen* v. *McCurry,* supra; *Migra* v. *Warren City School District Board of Education,* supra; *Kremer* v. *Chemical Construction Corporation,* supra

Under the Constitution's Full Faith and Credit Clause and the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, a federal court must give the state court judgments the same preclusive effect as would be given that judgment under the law of the state in which such judgment was rendered. *Allen* v. *McCurry,* supra; *Kremer* v. *Chemical Construction Corporation,* supra; *Migra* v. *Warren City School District Board of Education,* supra; U.S. Const., Art. IV, § 1; 28 U.S.C. § 1738.

In determining the application of res judicata or collateral estoppel to an asserted § 1983 claim in this case, the federal court must apply the Texas preclusion law. If under Texas law, the issue or claim asserted would be barred by res judicata or collateral estoppel, then the federal court will give the prior

judgment the same preclusive effect as the Texas court. *Flores* v. *Edinburg Consolidated I.S.D.*, supra, 28 U.S.C. § 1738.

In this appeal, Gregory attempts to cast this case as one of first impression because "Gregory's federal § 1983 claims did not mature until after the judgment became final," and therefore, he asserts that the § 1983 claim is a new claim and not precluded by the Texas judgment. If Gregory's § 1983 claim were grounded upon facts and issues other than those placed in issue and previously adjudicated in the Texas Courts, his alleged claim would not be precluded. However, the very facts and issues which give rise to his asserted § 1983 claim have been previously asserted by him and fully adjudicated. The cases cited by Gregory regarding the maturing of his § 1983 claim after the Texas judgment [*Lawlor* v. *National Screen Corp.*, 349 U.S. 322 (1955); *Norco Construction, Inc.* v. *King County,* 801 F.2d 1143 (9th Cir. 1986); *Battieste* v. *Baton Rouge,* 732 F.2d 439 (5th Cir. 1984); *Downtown* v. *Vandemark,* 581 F.Supp. 40 (N.D. Ohio, 1983)] and related cases, are not in point with the case before this court because the underlying factual basis for the newly asserted claims in the instant cases had *not* been previously asserted or litigated in the previous state action.

Thus, the Fifth Circuit correctly applied claim preclusion to Gregory's asserted § 1983 claim in accordance with applicable state and federal law.

2.

THERE IS NO CONFLICT IN THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS AND THOSE DECISIONS OF THE SEVENTH AND TENTH CIRCUIT COURTS OF APPEAL IN THEIR CLAIM PRECLUSION APPLICATION UNDER 28 U.S.C § 1738 AND 43 U.S.C. § 1983 TO PRIOR STATE COURT JUDGEMENTS.

Gregory has erroneously asserted that a conflict exists between the decisions of the Fifth Circuit and the Seventh and Tenth

Circuits regarding the application of claim preclusive effect to prior state court judgments in subsequent cases asserted under § 1983, No such conflict existed prior to the decisions of the Fifth Circuit in this case, and no such conflict has been created by such decision. Each of the cases cited by Gregory to be in conflict with the Fifth Circuit's decision in this case is clearly distinguishable.

In each applicable instance, irrespective of whether the cases were determined by the Fifth Circuit, Seventh Circuit or Tenth Circuit, these courts have uniformly applied the provisions of 28 U.S.C. § 1738 and 42 U.S.C. § 1983, and each circuit has adhered to the application of the foregoing provisions in accordance with the *Migra* v. *Warren City School District of Education*, supra, *Allen* v. *McCurry*, supra, *Kremer* v. *Chemical Construction Corp.*, supra, and related Supreme Court precedent.

Each circuit has not hesitated to apply 28 U.S.C. § 1738 to give a state court judgment the same preclusive effect as the state rendering the judgment would permit. In accordance with *Allen* v. *McCurry*, each circuit will deny a litigant a federal form for the assertion of federal constitutional rights if a state tribunal has both recognized the constitutional claims asserted and provided fair procedures for determining them.

The cases cited by Gregory simply apply 28 U.S.C. 1738 in accordance with the applicable state claim preclusion law. Such cases do not even suggest a conflict with decisions of the Fifth Circuit.

In *Scoggins* v. *State of Kansas*, 802 F.2d 1289 (10th Cir. 1986), the subsequent claim asserted in federal court was not considered precluded by a prior administrative agency decision because the Tenth Circuit found the Courts of Kansas would not have given preclusive effect to the prior decision.

In *Morgan* v. *City of Rawlins*, 792 F.2d 975 (10th Cir. 1986), the Tenth Circuit held that a subsequent Federal § 1983 action was not precluded by a prior Wyoming state court action because

applying Wyoming principals of claims preclusion it would not be precluded under the laws of that State.

In *Thournir* v. *Meyer*, 803 F.2d 1093 (10th Cir., 1986), Eileen M. Thournir sued the Colorado Secretary of State under 42 U.S.C. § 1983, challenging a Colorado statute that requires a person wishing to run as an unaffiliated candidate to be registered in Colorado as an unaffiliated voter for at least one (1) year prior to filing a nominating petition, alleging the statute violates Article I, § 2 of the U.S. Constitution as well as the First and Fourteenth Amendments. The Tenth Circuit determined that Colorado state law required that a party against whom the doctrine of res judicata and collateral estoppel was asserted to have a full and fair opportunity to litigate the issue in the prior adjudication, and held that the brevity of the state court action denied Thournir the full and fair opportunity required by Colorado law to litigate the constitutional issue. In our case, Gregory chose to let the case languish in state court for eleven years.

In *Jones* v. *City of Alton, Illinois*, 757 F.2d 878 (7th Cir. 1985), the defendants moved for a dismissal on res judicata based upon the administrative review in the state circuit court, which decision was upheld by the state appellate court. Jones contended that he was not given an opportunity to present evidence showing racial discrimination in his discharge and that the state court action erred in limiting the scope of the trial and he was denied an opportunity to present and show racial discrimination. In our case it was Gregory who sought to limit the scope of the September 21, 1979, state district court trial to the one narrow issue of whether on that very day of the hearing he consented to the settlement agreement and interlocutory judgment previously agreed to and personally signed by him. In the *Jones* case the Seventh Circuit stated that a state court judgment must be given the same res judicata effect in federal court that it would be given in the courts of the rendering states.

Apparently Petitioner does not urge *Boileau* v. *Bethlehem Steel Corp.*, 730 F.2d 929 (3rd Cir., 1984), as one of his "split" cases,

but he did cite it along with the others. On June 20, 1978, Mrs. Boileau, took two separate actions; she filed a petition in the Pennsylvania state court to strike a prior judgment in the Court of Common Pleas, and she filed a diversity of citizenship action in the federal district court. Mrs. Boileau presented her petition to strike the judgment rendered against her in the state court, and that court determined under Pennsylvania law such an action to strike could be considered only on the basis of facts appearing on the face of the record, and that no additional evidence would be admitted. On appeal to the appellate courts of Pennsylvania, such action against her was upheld. The U. S. District Court held that she was barred by the prior actions of the state courts. The Third Circuit held the filing of the federal action on the same day as the court petition preserved the federal diversity forum for adjudication on the merits of Mrs. Boileau's challenge to the prior judgment and was not bound by any considerations of res judicata or collateral estoppel. No preclusive effect was given to the prior judgment because she did not, under Pennsylvania law, have an opportunity to refute the state judgment by the presentation of any evidence in the state proceedings, and therefore, she was not afforded any opportunity to be heard in any manner in the state court.

As is clearly evident from a review of the foregoing cases, preclusive effect to the prior state judgment was not given because the state court itself would not have given preclusive effect to the judgment or because the issues raised in the subsequent case were not litigated or in issue in the previous state action. They are instead based upon individual review of each state's issue and claim preclusion decisions. This court has ruled in *Kremer* such procedure to be the proper course, stating that 28 U.S.C. § 1738 "goes beyond common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken". 456 U.S. at 482; 102 S.Ct. at 1898.

Accordingly, there is no conflict in the decisions of the Fifth Circuit and those of the Seventh and Tenth Circuits regarding the application of claim preclusion to prior state judgments.

None of the foregoing cases are in conflict with the Fifth Circuit's decision in this case, in that the factual basis for Gregory's § 1983 claims have already been adjudicated in prior state actions and must be conceded against him. Gregory cannot assert a § 1983 claim by the concession of the factual matters and issues previously adjudicated. In addition, Gregory was afforded a full and fair opportunity to present evidence and challenge the validity of the interlocutory judgment in the prior state action, and he failed to do so. The issues of right to trial on the merits, a jury trial and due process under both the Texas Constitution and the United States Constitution have been fully raised heretofore in the Texas proceedings and adjudicated. Accordingly, the cases cited by Gregory have no merit or application to his case for purposes of granting a writ.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectively submitted,

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